

INDEX.

STATEMENT	Page. 1
TREATIES AND LEGISLATION INVOLVED ...	3
ARGUMENT	13
I. Without the consent of the Secretary of the Interior the heirs were powerless to sell the allotment	14
1. The act of March 2, 1889, plainly declares, not that the allottee may not alienate, but that the land itself shall not be subject to alienation for a period of 25 years from the date of patent. In the absence of any clear and controlling reason to the contrary, the act should be applied according to this obvious meaning of its language	15
2. Neither in the antecedents of the act nor in any consideration of necessity or convenience respecting its policy, can an excuse be discovered for departing from its letter. On the contrary, to imply an exception in favor of the alienation of inherited lands would be productive of hardship and injustice and tend to defeat the protective purposes of the act and the objects of the reservation	16
3. The acts of May 31, 1900, and May 27, 1902, which provide, the former with reference to this reservation specifically and the latter generally, that restricted allotments when inherited may be sold by the heirs subject to the approval of the Secretary of the Interior, remove all doubt, if any there can be, concerning the intention of the act of March 2, 1889....	21

(i)

ARGUMENT—Continued.

Page.

I. Without the consent of the Secretary of the Interior, etc.—Continued.	
4. The decision of the court below accords with the authorities	22
II. The decree of the United States court for the Indian Territory is null and void....	26
III. The United States is entitled to maintain this suit in its own name	27

CITATIONS.

Cases.

	Page.
<i>Aaron v. United States</i> , 204 Fed. 943	23
<i>Bowling v. United States</i> , 191 Fed. 19	1
<i>Choctaw-Chickasaw cases</i> , 199 Fed. 813	23
<i>Clark v. Lord</i> , 20 Kans. 390	25
<i>Commissioners of Miami County v. Brackenridge</i> , 12 Kans. 114	24
<i>Farrington v. Wilson</i> , 29 Wis. 383	25
<i>Frederick v. Gray</i> , 12 Kans. 518	24
<i>Goodrum v. Buffalo</i> , 162 Fed. 817	23, 27
<i>Heckman v. United States</i> , 224 U. S. 413	26, 27
<i>Kansas Indians, The</i> , 5 Wall. 737	4, 17, 18
<i>Mc Mahon v. Welsh</i> , 11 Kans. 280	23
<i>Mullen v. United States</i> , 224 U. S. 448	16
<i>Tiger v. Western Investment Company</i> , 221 U. S. 286 ..	22
<i>United States v. Aaron</i> , 183 Fed. 347	22
<i>United States v. Freeman</i> , 3 How. 556	22
191 Fed. 19	1

Acts and treaties.

Act of March 3, 1859 (11 Stat. 425)	4
Act of March 3, 1873 (17 Stat. 631)	6, 17, 18
Act of June 23, 1873 (17 Stat. 417)	18
Act of February 8, 1887 (24 Stat. 388)	7, 17, 20
Act of March 2, 1889 (25 Stat. 1013)	2, 7, 15
Act of May 2, 1890 (26 Stat. 81)	11
Act of June 7, 1897 (30 Stat. 62)	11
Act of May 31, 1900 (31 Stat. 221)	12, 21
Act of May 27, 1902 (32 Stat. 245)	12, 21
Act of June 28, 1906 (34 Stat. 539)	22
Treaty of October 27, 1832 (7 Stat. 403)	4
Treaty of October 29, 1832 (7 Stat. 410)	3
Treaty of May 30, 1854 (10 Stat. 1082)	4, 18
Treaty of June 5, 1854 (10 Stat. 1093)	18
Treaty of February 23, 1867 (15 Stat. 513)	5, 7



In the Supreme Court of the United States.

OCTOBER TERM, 1913.

GEORGE E. BOWLING AND MIAMI INVEST- ment Company, appellants, <i>v.</i> THE UNITED STATES.	}	No. 177.
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*ON APPEAL FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT.*

BRIEF FOR THE UNITED STATES.

STATEMENT.

This suit was brought against the appellants and other defendants for the purpose of clearing the title to an Indian allotment in Oklahoma. After a demurrer to the bill had been overruled (R., 21, 24) a separate answer was interposed by the defendants (R., 26), the case was set down for hearing upon that answer and the bill, and a decree was thereupon rendered in favor of the United States (R., 38). Upon appeal to the Circuit Court of Appeals for the Eighth Circuit the decree was affirmed. (Opinion, R., 52; 191 Fed., 19.)

From the bill and answer it appears that the land in question, approximately 200 acres in area, was patented on April 8, 1890, to Pe-te-lon-o-zah, or

William Wea, a member of the confederated Wea, Peoria, Kaskaskia, and Piankeshaw tribes of Indians. The patent (R., 12) contains the following express restrictions:

Provided, That the said lands shall not be alienated nor subject to levy, sale, taxation, or forfeiture for a period of twenty-five years from the date hereof, and any contract or agreement to sell or convey said land before the expiration of said period shall be absolutely null and void; to have and to hold the said land with the appurtenances thereunto belonging unto the said Pe-te-lon-o-zah, or William Wea, and to his heirs forever, with proviso as aforesaid.

It was issued under and in pursuance of the act of March 2, 1889 (25 Stat. 1013), the relevant provisions of which will be hereinafter discussed. The patentee died intestate on or about January 23, 1894, leaving Indian heirs who inherited the land. On December 2, 1897, one John R. Rundell, named as a defendant by the bill, undertook to obtain the title, and an instrument was executed in his favor on that date by several Indians who were entitled to or claimed the inheritance. The consideration agreed upon (according to the answer) was \$1,000, of which \$25 was paid down and the balance withheld. Subsequently a suit for specific performance was instituted against Rundell in the names of his Indian grantors (R., 7, 13, 35) in the United States court for the Northern District of the Indian Territory. Rundell answered (R., 15) and a decree was entered requiring him to

take title and pay the balance of the consideration money. The bill alleges (R., 8) that this suit was fraudulent and collusive—a scheme whereby Rundell sought under color of a court decree to evade the restrictions affecting the land; that it was not a real and substantial controversy between the parties, but a collusive proceeding in which Rundell controlled the plaintiffs and employed their attorney; that the decree resulted from the fraud and deception practiced by the parties on the court, and that the court had no jurisdiction to render it. The answer (R., 32) denies these things and relies upon the decree as an estoppel (R., 36). But it affirmatively appears in the bill, and is not contradicted in the answer, that the Government was in no sense a party to, or represented in, those proceedings.

There were various mesne conveyances under the the Rundell deed in virtue of which the appellants claims title. The bill seeks to have these, as well as the decree of the Indian Territory Court, declared to be void.

Treaties and Legislation Involved.

By the treaty of October 29, 1832 (7 Stat. 410), the Piankeshaw and Wea Tribes of Indians relinquished to the United States the lands which they then held in the States of Missouri and Illinois, and received from the Government "for their permanent residence, two hundred and fifty sections of land within the limits of the survey of the lands set apart for the Piankeshaws, Weas, and Peorias," in a region now included within the boundaries of Kansas.

By the treaty of May 30, 1854 (10 Stat. 1082), the Piankeshaw and Wea Tribes became consolidated with the Kaskaskias and Peorias, who had received a similar grant (treaty of Oct. 27, 1832; 7 Stat. 403), and the consolidated tribe re-ceded the Kansas lands to the United States, reserving a quantity sufficient to supply each member then living with an allotment of 160 acres, and reserving in addition 10 sections to be held as the common property of the tribe (art. 2). The United States agreed to survey the ceded lands and to sell them for the benefit of the Indians. The allotments as well as the common tract were to be selected, before the ceded lands were sold, in the manner described in the third article, which provided that "patents for the lands selected by or for individuals or families may be issued subject to such restrictions respecting leases and alienation, as the President or Congress of the United States may prescribe." The restrictions which were expressed in the allotment patents subsequently issued have been found by this court to be like those contained in similar patents issued to the Shawnees, which provided: "The said lands shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior." (*The Kansas Indians*, 5 Wall. 737, 740, 741.)

The act of March 3, 1859 (11 Stat. 425, 430), section 11, provided:

That in all cases where, by the terms of any Indian treaty in Kansas Territory, said Indians

are entitled to separate selections of land, and to a patent therefor, under guards, restrictions, or conditions for their benefit, the Secretary of the Interior is hereby authorized to cause patents therefor to issue to such Indian or Indians, and their heirs, upon such conditions and limitation, and under such guards or restrictions as may be prescribed by said Secretary.

By the treaty of February 23, 1867 (15 Stat. 513), arrangements were made for moving this consolidated tribe and other tribes of Indians out of Kansas to the Indian Territory. By article 21 it was provided that the United States should sell the common tract (then consisting of nine and one-half sections), and receive the proceeds for the benefit of the tribe. By article 22 a body of land in the Indian Territory which under this same treaty was purchased from the Senecas and Quapaws, was granted to the Weas and their associates for the same price which the Government had agreed to pay the previous owners, and for the accomplishment of this transaction it was agreed that the money to be derived from the sale of the nine and one-half sections, supplemented, if necessary, by other funds of the consolidated tribe then held by the United States, should be used in supplying the consideration agreed upon with the Senecas and Quapaws. The Wea and associated Indians agreed, by article 23, "to dispose of their allotments in Kansas and remove to their new homes in the Indian country," and to that end the Secretary of the Interior was "authorized to remove altogether the restrictions upon the sales

of their [Kansas] lands, provided under authority of" the treaty of 1854, *supra*, "in such manner that adult Indians may sell their own lands, and that the lands of minors and incompetents may be sold by the chiefs, with the consent of the agent, certified to the Secretary of the Interior and approved by him."

Article 26 permitted a confederation with the Miamis upon the new reservation.

This new reservation is situate in the northeast corner of the present State of Oklahoma and includes the land involved in this controversy.

The act of March 3, 1873 (17 Stat. 631), made provisions for the disposition of the lands of the Miami Tribe in Kansas, and for its consolidation with the Weas, etc., on their reservation in Indian Territory. The Secretary of the Interior was directed to make a census of the Miamis, consisting of two lists, one containing the names of those desirous of becoming citizens of the United States, and the other the names of those "who elect to remain under the care of the United States, and to unite with the Wea, Peoria, Kaskaskia, and Piankeshaw Indians" (sec. 4). By section 3 those members who desired to become citizens of the United States were to apply to the circuit court of the United States in Kansas, and prove by at least two competent witnesses to that court's satisfaction that they were sufficiently intelligent and prudent to manage their own affairs, and had for a period of five years been able to maintain themselves and families, and had adopted the habits of civilized life. Naturalization was to follow as in

the case of aliens, and thereupon the Secretary of the Interior might, at the request of any such persons, cause the lands severally held by them and their minor children (in Kansas) to be conveyed to them "by patent in fee simple, without the power of alienation." He might also from time to time award them their proportion of tribal moneys, "after which," the third section provides, "said Indians and their minor children shall cease to be members of any Indian tribe; but the land so patented to them shall not be subject to levy, taxation, or sale during the natural lives of said Indians or of their minor children." The remaining Indians, constituting the Miami Tribe, were to be consolidated with the Weas, etc., under the name of the "United Peorias and Miamis." Pecuniary adjustments were arranged, and it was provided (sec. 6) that after the union the members of this consolidation should draw equal annuities and all have an interest in the reservation.

Neither this statute nor the treaty of 1867, *supra*, authorized allotment of the lands in the Indian Territory. By the general allotment act of February 8, 1887 (24 Stat. 388), Congress made provision for the allotment of lands in severalty to the Indians on reservations generally, but excepted a number of reservations from the operation of the act and among them that of the "Miamis and Peorias." (Sec. 8.) However, by the act of March 2, 1889, *supra*, the provisions of the general allotment act of 1887, with certain modifications, were extended to the reserva-

tion of these confederated bands, and the allotment involved herein was made under the provisions of that act. Its pertinent provisions are:

* * * That the provisions of chapter one hundred and nineteen of the acts of eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," are hereby declared to extend to and are made applicable to the Confederated Wea, Peoria, Kaskaskia, and Piankeshaw Tribes of Indians, and the Western Miami Tribe of Indians, now located in the northeastern part of the Indian Territory and to their reservation, in the same manner and to the same extent as if said tribes had not been excepted from the provisions of said act, except as to section six of said act, and as otherwise hereinafter provided.

That the Secretary of the Interior is hereby authorized and directed, within ninety days from and after the passage of this act, to cause to be allotted to each and every member of the said Confederated Wea, Peoria, Kaskaskia, and Piankeshaw Tribes of Indians, and the Western Miami Tribe of Indians, upon lists to be furnished him by the chiefs of said tribes, duly approved by them, and subject to the approval of the Secretary of the Interior, an allotment of land not to exceed two hundred acres, out of their common reserve, to each

person entitled thereto by reason of their being members of said tribes by birth or adoption; all allotments to be selected by the Indians, heads of families selecting for their minor children, and the chiefs of their respective tribes for each orphan child.

* * * * *

The land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of patent therefor, and said lands so allotted and patented shall be exempt from levy, sale, taxation, or forfeiture for a like period of years. As soon as all the allotments or selections shall have been made as herein provided, the Secretary of the Interior shall cause the patent to issue to each and every person so entitled, for his or her allotment, and such patent shall recite in the body thereof that the land therein described and conveyed shall not be alienated for twenty-five years from the date of said patent, and shall also recite that such land so allotted and patented is not subject to levy, sale, taxation, or forfeiture for a like period of years, and that any contract or agreement to sell or convey such land or allotments so patented entered into before the expiration of said term of years shall be absolutely null and void.

SEC. 2. That in making allotments under this act no more in the aggregate than seventeen thousand and eighty-three acres of said reservation shall be allotted to the Miami Indians, nor more than thirty-three thousand two hundred and eighteen acres in the aggregate to the United Peoria Indians; and said amounts shall be treated in making said allot-

ments in all respects as the extent of the reservation of each of said tribes, respectively * *

* After the allotments herein provided for shall have been completed, the residue of the lands, if any, not allotted, shall be held in common under present title by said United Peorias and Miamis in the proportion that the residue, if any, of each of the said allotments shall bear to the other. And said United Peorias and Miamis shall have power, subject to the approval of the Secretary of the Interior, to lease for grazing, agriculture, or mining purposes from time to time and for any period not exceeding ten years at any one time, all of said residue, or any part thereof, the proceeds or rental to be divided between said tribes in proportion to their respective interests in said residue. And after said allotments are completed each allottee may lease or rent his or her individual allotment for any period not exceeding three years, the father acting for his minor children, and in case of no father then the mother, the chief acting for orphans of the tribe to which said orphans may belong.

At the expiration of twenty-five years from the date of the passage of this act, all of said remaining or unallotted lands may be equally divided among the members of said tribes, according to their respective interests, or the same may be sold on such terms and conditions as the President and the adult members of said tribe may hereafter mutually agree upon, and the proceeds thereof divided according to ownership as hereinbefore set forth: *Provided*, That before any division of the land is made,

or sale had, that three-fourths of the bona-fide adult members of said tribes shall petition the Secretary of the Interior for such division or sale of said land: *Provided further*, That sections one and two of this act shall not take effect until the consent thereto of each of said tribes separately shall have been signified by three-fourths of the adult male members thereof, in manner and form satisfactory to the President of the United States.

The Indians who received allotments were made citizens of the United States by section 43 of the act of May 2, 1890 (26 Stat. 81, 99), which declares that:

The confederated Peoria Indians residing in the Quapaw Indian Agency, who have heretofore or who may hereafter accept their land in severalty under any of the allotment laws of the United States, shall be deemed to be, and are hereby, declared to be citizens of the United States from and after the selection of their allotments, and entitled to all the rights, privileges, and benefits as such, and parents are hereby declared from that time to have been and to be the legal guardians of their minor children without process of court: *Provided*, That the Indians who become citizens of the United States under the provisions of this act do not forfeit or lose any rights or privileges they enjoy or are entitled to as members of the tribe or nation to which they belong.

The act of June 7, 1897 (30 Stat. 62, 72), provided:

That the adult allottees of land in the Peoria and Miami Reservation in the Quapaw Agency,

Indian Territory, who have each received allotments of two hundred acres or more may sell one hundred acres thereof, under such rules and regulations as the Secretary of the Interior may prescribe.

The act of May 31, 1900, section 7 (31 Stat. 221, 248), after declaring that the adult *heirs* of deceased allottees of the Citizen Band of Pottawatomie Indians and of the Absentee Shawnee Indians of Oklahoma might sell their inherited lands "*subject to the approval of the Secretary of the Interior,*" extended the same permission to the Peorias and Miamis as follows:

That the provisions hereof as to the sale of inherited lands by heirs of deceased allottees of the Citizen Band of Pottawatomie Indians and Absentee Shawnee Indians are hereby extended and made applicable to the heirs of allottees of the Peoria and Miami Indians, who were authorized by the act approved June seventh, eighteen hundred and ninety-seven, to sell a portion of their lands, and all sales and conveyances of lands of deceased allottees by their heirs, which have been duly made and executed by such heirs and duly approved by the Secretary of the Interior, are hereby ratified and confirmed.

By section 7 of the Indian appropriation act of May 27, 1902 (32 Stat. 245, 275), it was provided:

That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such de-

cedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, *but all such conveyances shall be subject to the approval of the Secretary of the Interior*, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee. All allotted land so alienated by the heirs of an Indian allottee and all land so patented to a white allottee shall thereupon be subject to taxation under the laws of the State or Territory where the same is situate: *Provided*, That the sale herein provided for shall not apply to the homestead during the life of the father, mother or the minority of any child or children.

ARGUMENT.

I. Without the consent of the Secretary of the Interior, the heirs were powerless to sell the allotment.

1. The act of March 2, 1889, plainly declares, not that the allottee may not alienate, but that the land itself shall not be subject to alienation for a period of twenty-five years from the date of patent. In the absence of any clear and controlling reason to the contrary the act should be applied according to this obvious meaning of its language.

2. Neither in the antecedents of the act nor in any consideration of necessity or convenience respecting its policy can an excuse be discovered for depart-

ing from its letter. On the contrary, to imply an exception in favor of the alienation of inherited lands would be productive of hardship and injustice and tend to defeat the protective purposes of the act and the objects of the reservation.

3. The acts of May 31, 1900, and May 27, 1902, which provide, the former with reference to this reservation specifically and the latter generally, that restricted allotments when inherited may be sold by the heirs *subject to the approval of the Secretary of the Interior*, remove all doubt, if any there can be, concerning the intention of the act of March 2, 1889.

4. The decision of the court below accords with the authorities.

II. The decree of the United States court for the Indian Territory is null and void.

III. The United States is entitled to maintain this suit in its own name.

I.

Without the consent of the Secretary of the Interior the heirs were powerless to sell the allotment.

It sufficiently appears that the heirs of the allottee were themselves members of the confederated tribes, and the case has been tried throughout upon that theory. The bill avers (R. 2, paragraph second), that it is brought on behalf of certain members of the confederated Wea, Peoria, Kaskaskia, and Piankeshaw tribes, "to wit, the unknown heirs of Petelonozah or William Wea, deceased," as well as on behalf of the United States; and it also alleges (R. 9, top)

that the persons who made the conveyance to Rundell, under which the appellants claim, "were members of the Peoria-Miami Band of Indians in the Indian Territory." Although these allegations regarding the status of the allottee's heirs and the appellants' remote grantors are not as full and distinct as they might be, they leave no doubt, when read with the whole bill, that the purpose was to characterize the heirs, whoever they were, and the makers of the deed (who, according to the answer, were in fact the only heirs, R. 34, paragraph XVI), as tribal members. Upon this proposition the appellants have made no issue, either in their answer or subsequently; and the court below (opinion, R. 52) accepted it as true.

Consequently, the question whether the restriction on alienation would have persisted if the land had passed by inheritance to some person *sui juris*—a white person, for instance, not a member of any tribe—is not presented. We will assume that the status of heirs and ancestors was the same, and that if any objection had been taken to the bill in that regard, it could and would have been obviated by an amendment in accordance with the fact.

1. The act of March 2, 1889, plainly declares, not that the allottee may not alienate, but that the land itself shall not be subject to alienation for a period of twenty-five years from the date of patent. In the absence of any clear and controlling reason to the contrary, the act should be applied according to this obvious meaning of its language.

The language of the statute under which the allotment was made, and which furnished the only authority for making it, is in absolute accord with the decision of the court below:

*The land so allotted shall not be subject to alienation for twenty-five years from the date of issuance of patent therefor, and said lands so allotted and patented shall be exempt from levy, sale, taxation, or forfeiture for a like period of years. * * **

*Such patent shall recite in the body thereof that the land therein described and conveyed shall not be alienated for twenty-five years from the date of said patent, and shall also recite that such land so allotted and patented is not subject to levy, etc. * * **

Any contract or agreement to sell or convey such land or allotments so patented entered into before the expiration of said term of years shall be absolutely null and void.

These words are too plain to justify construction. If Congress had intended that the restriction should die with the original allottee, it would naturally have provided in terms that the land should remain inalienable during his lifetime, not exceeding twenty-five years from the date of the grant, as was done in the case of the Choctaw and Chickasaw homesteads. See *Mullen v. United States* (224 U. S. 448, 453). If any reason can be found to warrant a departure from the language of this statute it must be extrinsic to the statute itself, and so clear and satisfactory that no doubt may be admitted of its soundness.

2. Neither in the antecedents of the act nor in any consideration of necessity or convenience

respecting its policy, can an excuse be discovered for departing from its letter. On the contrary, to imply an exception in favor of the alienation of inherited lands would be productive of hardship and injustice and tend to defeat the protective purposes of the act and the objects of the reservation.

This reservation, when established by the treaty of February 23, 1867, *supra*, was undoubtedly intended as a permanent home for tribal Indians. It was a part of the Indian Territory, which at that time was looked upon as a region set apart for Indians exclusively for an indefinite period. The Indians who came to the reservation were such as desired to continue their tribal life or were incompetent to live any other successfully. Those members of the Peorias, Weas, Kaskaskias, and Piankeshaws who wished to do so, were permitted by article 28 of the treaty to remain in Kansas, become citizens, and sever their tribal relations. The rest, including presumably all or most of the unprogressive and incompetent, moved to the new domicile away from contact with the white men, whose immigration into Kansas (*The Kansas Indians*, 5 Wall. 737) was doubtless responsible for the change. In like manner, by the act of March 3, 1873, *supra*, the competent Miamis were sifted from the incompetent, and the latter were united with the Weas and their associates. Neither the treaty of 1867 nor the act of 1873 made any provision for allotting the reservation. The general allotment act of 1887 excluded it expressly. The

allotment plan originated with the act of 1889, under which the patent of William Wea was issued. There is nothing in the antecedents of that act to supply color for a departure from its plain terms. If it were permissible to consider what was done in Kansas before this reservation was created, the result would be hostile to the appellants' contention, for, as we have seen, the patents issued to the Weas, etc., under the treaty of May 30, 1854, provided that the lands patented should "never be sold by the grantee *or his heirs* without the consent of the Secretary of the Interior," and these Indians (not considering now those who may have elected to become citizens and drop out of the tribe when it moved) were never made competent to sell any of their lands in the absence of such consent.

Similar patents were issued to the Miamis under their treaty of June 5, 1854 (art. 3, 10 Stat. 1093), *The Kansas Indians* (5 Wall. 737, 742). Congress found it necessary to pass a special act (June 23, 1873, 17 Stat. 417) to permit the State of Kansas to remove these restrictions "in all cases in which the title has legally passed to citizens of the United States *other than Indians*." The cases contemplated by this special act must have been largely if not exclusively cases of inheritance by white people. Even those Miamis who under the act of March 3, 1873, *supra*, were permitted to become citizens and end their relations with the tribe were not intrusted with the power to sell their Kansas allotments. Their patents were to be "without the power of alienation";

the allotments were not to be sold "during the natural lives of said Indians or of their minor children," and this although they were obliged by the act to prove to the satisfaction of the Circuit Court that they were sufficiently prudent and intelligent to manage their own affairs, that they had for a period of five years been able to maintain themselves and their families, and had adopted the habits of civilized life. So little, then, was the trust reposed in the ability of the most progressive and competent of the Miamis, and so much the more emphatic is the presumption that the others, who remained with the tribe, were regarded as unfit to have control of property. The status of these last, thus brought out prominently by the process of elimination, lends a side light upon the status of the Weas, Peorias, etc., with whom they were thenceforth mingled. The reservation became the home of various bands of tribal Indians, whose members had never been intrusted with dispositive power over the parcels of land which they had previously possessed in severalty elsewhere.¹

¹ The sale of allotments in Kansas by the Weas, etc., was an incident to the removal of those bands to the Indian Territory. The Indians undertook to dispose of their allotments and to move within two years, and to that end the Secretary of the Interior was "authorized to remove the restrictions, in such manner that adult Indians may sell their own lands, and that the lands of minors and incompetents may be sold by the chiefs, with the consent of the agent, certified to the Secretary of the Interior and approved by him." (Treaty of Feb. 23, 1867, *supra*, art. 23.) This language, we think, left all the sales under the Secretary's superintendence. Besides, the principal reasons for the restrictions as to those lands ceased with the removal of the Indian owners.

Coming back to the act of 1889, the only conceivable excuse for excepting inherited lands must depend upon a theory that their protection is unnecessary. Such a theory would be speculative and wholly unreasonable. The act provides that an allotment of "not to exceed" 200 acres shall be made to each member, adult or minor; that the allotments to the Miamis shall all be taken from a specified aggregate acreage, and the allotments to the United Peorias (including the Weas, etc.), all from another specified aggregate acreage; that the residue of the lands, "*if any*," shall be held in common by the Miami and United Peoria Tribes "in the proportion that the residue, *if any*, of each of the said allotments [*sic*, evidently referring to the two specified acreages] shall bear to the other"; and that, at the expiration of 25 years from the date of the act, the remaining or unallotted lands may be partitioned, or, with the agreement of the President, sold, etc. The allotments are to be made within 90 days from the passage of the act, by the Secretary of the Interior, upon lists furnished by the chiefs. The scheme contemplates the possibility that the allotments may consume the whole reservation, except small parcels devoted to school, church, and cemetery uses, and makes no provision, otherwise than through inheritance (see General allotment act of 1887, sec. 5, 24 Stat., 388, referred to by sec. 1 of this act of 1889), for those members who may be born during the 25-year period. Hence it does not follow that lands inherited will in

all cases be cumulative to lands derived by direct allotment. In many cases they may constitute the only estate of members born after the allotments have been completed and even attaining majority before the period of restriction expires.

Again, the land which an allottee inherits may be of vastly more consequence to his comfort and welfare than his own direct allotment. Often, as in the case of a child dwelling with his parents, or a wife with her husband, the inheritance will have been the home, where all interests have centered and all improvements have been made, while the direct allotment has remained uncultivated and neglected. The appellant's construction would permit a defenseless widow or daughter to sell the home from over her head or the farm from under her feet for a song.

Finally, the object of the reservation was to protect the Indians from contact with outsiders as well as to provide them with a place to inhabit and cultivate. This policy would be defeated if the Indians were made free to convey their inherited lands without supervision and without regard to the character and desirability of their grantees. Only when Congress has said so expressly should such a policy be deemed abandoned.

3. The acts of May 31, 1900, and May 27, 1902, which provide, the former with reference to this reservation specifically and the latter generally, that restricted allotments when inherited may be sold by the heirs subject to the approval of the Secretary of the Interior, remove

all doubt, if any there can be, concerning the intention of the act of March 2, 1889.

Upon the propriety of resorting to these statutes see: *United States v. Freeman*, 3 How. 556, 564.
Tiger v. Western Inv. Co., 221 U. S. 286, 309.

4. *The decision of the court below accords with the authorities.*

In *United States v. Aaron* (183 Fed. 347), decided in the circuit court for the western district of Oklahoma, the fourth subdivision of section 2 of the Osage Allotment act of June 28, 1906 (34 Stat. 539) where it is provided that the homestead allotments "shall be inalienable and nontaxable until otherwise provided by act of Congress," was held to prohibit the alienation of such an allotment by the heir of a deceased allottee, and the deeds were canceled. The court said (p. 351):

The act furnishes its own policy and limitations. The language used relative to the homestead in subdivision 4 of section 2 is that it "shall be inalienable and nontaxable until otherwise provided by act of Congress." The expression of the act is not that the allottee or member shall not alienate, but that the land shall be inalienable. The restriction, therefore, runs with the land, and the policy of the law is that its protection extends as well to the heirs as to the original allottees.

This ruling was affirmed by the circuit court of appeals, Judge Sanborn, who wrote the opinion, saying:

Restrictions upon alienation of this character attach to and run with the land, and the

inability to convey disqualifies the heir as well as the immediate allottee.

Aaron v. United States, 204 Fed. 943, 944.

In *Goodrum v. Buffalo* (162 Fed. 817) the same conclusion was reached respecting the restriction imposed on Quapaw allotments by the act of March 2, 1895 (28 Stat. 907), viz, that the "lands shall be inalienable for a period of twenty-five years from and after the date of said patents." The Circuit Court of Appeals there said (p. 823):

It was as much within the policy and purpose of the Government to see that the heirs of the allottee, in case of his death, were protected against alienation of the land, as the allottee himself; otherwise, they might become a charge upon the public, and the beneficent policy of the Government in bringing about the allotment of lands in severalty would be thwarted.

See, also, to the same effect, *Choctaw-Chickasaw Cases* (199 Fed. 813).

Several State cases which the appellants have cited will now be briefly discussed.

McMahon v. Welsh (11 Kans. 280) involved lands patented to an "incompetent" Wyandotte Indian under the treaty of January 31, 1855 (10 Stat. 1159, 1161), with a restriction on alienation. The lands descended to and were conveyed by an heir who, according to the statement of facts in the case, as the court construed it, belonged to a class whose members, as "competent," were equipped by that treaty with the entire control over their interests and

affairs. The conveyance was made in 1864. A treaty ratified in 1868 expressly removed all restrictions upon the sale of lands previously patented to "incompetents" and authorized the Secretary to confirm sales previously made by Indians of that class. The conveyance in question was confirmed by him in 1871. The taxes in controversy were assessed and levied for the year 1870; and one problem discussed by the court was whether the land was then taxable, the conveyance not having then been confirmed. The opinion assumes that the lands were taxable if alienable. The court was of the opinion that when the land passed by descent from the incompetent to the competent Indian it became alienable—a conclusion which, obviously, has no bearing on the present case, since, by hypothesis, the land when conveyed was owned by one who, by force of the earlier treaty, had been specifically emancipated in respect of all his property and affairs.

Frederick v. Gray (12 Kans. 518). The issue was between a sheriff's deed, purporting to convey land of an incompetent Wyandotte, and a conveyance subsequently made by her heirs. The competency of the heirs to convey was not questioned. The only question was whether, when they undertook to do so, the title was beyond their reach, by reason of the sheriff's deed and certain other proceedings of no interest in the case at bar.

The Commissioners of Miami County v. Brackenridge (12 Kans. 114) involved the Miami treaty of June 5, 1854 (10 Stat. 1093), which declared that

the lands patented to the Indians should not be "liable to levy, sale, execution or forfeiture." The court held that after allotted lands had been lawfully sold to a white man a continuation of this exemption would be foreign to the treaty. "The exemption was based upon the use by the Indians, and when that use ceased the exemption also ceased" (p. 123). The case is clearly not in point.

Clark v. Lord (20 Kans. 390) involved the construction of the Ottawa treaty of June 24, 1862 (12 Stat. 1237), the seventh article of which provided that in patents issued for allotted lands it should be "stipulated that no Indian, except as herein provided, to whom the same may be issued, shall alienate or encumber the land allotted to him or her in any manner, until they shall, by the terms of this treaty, become a citizen of the United States." Of this provision the court said (p. 395):

The reservation, as to the conveyance, is personal, from the language used, and was not intended to bind the heirs of allottees.

The conclusion was based entirely upon, and is undoubtedly accordant with, the letter of the treaty, which differs so materially from the act of 1889 that the decision has no value as a precedent. Furthermore, the heir who made the deed in question was "under no legal disability," according to the findings of fact, and was therefore within the express permission of the treaty.

The case last cited relies on *Farrington v. Wilson* (29 Wis. 383), in which a similar restriction was

involved, viz, "not to be leased or sold *by the grantee*," etc., and in which also the court's opinion (p. 397) was based entirely upon the narrow terms in which the restriction was couched.

II.

The decree of the United States court for the Indian Territory is null and void.

As was held in *Heckman v. United States* (224 U. S. 413), the maintenance of limitations prescribed by Congress as part of its plan for distribution of Indian lands is distinctly an interest of the United States, and one which it may sue in its own courts to enforce. A transfer of allotted lands in violation of statutory restrictions is not simply a violation of the proprietary rights of the Indians, but is a violation of the governmental rights of the United States.

In the present case the allottee and his heirs, being incapacitated by an act of Congress from conveying the allotment directly, were manifestly impotent to bring about the same result indirectly by proceedings in court. Whether the proceedings upon which the appellants rely were or were not collusive and fraudulent is a matter of no consequence. The United States was not represented. Its interest was governmental in character, distinct from any interest of the Indians, and immune to the effects of anything that they might do. The court was wholly without jurisdiction to authorize the conveyance, and its decree was void.

So it was held by the Circuit Court of Appeals for the Eighth Circuit, after full consideration respecting a like decree rendered in an indistinguishable case.

Goodrum v. Buffalo (162 Fed. 817).

III.

The United States is entitled to maintain this suit in its own name.

In support of this proposition it is unnecessary to do more than refer to the recent decision in *Heckman v. United States* (224 U. S. 413, 436).

It is respectfully submitted that the decree of the Circuit Court of Appeals should be affirmed.

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MARCH, 1914.

